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FEDERAL RAILROAD ADMINISTRATION
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FRA - LOCOMOTIVE ENGINEER CERTIFICATION CASE
Edmund Vierra, Hearing Petitioner, DOT DKT. No. FRA 2007-0009
(FRA DKT. No. EQAL-2007-11)

Massachusetts Bay Commuter Railroad Company, Co-Respondent

**FEDERAL RAILROAD ADMINISTRATION'S AND MASSACHUSETTS BAY
COMMUTER RAILROAD COMPANY'S RESPONSE TO HEARING PETITIONER'S
BRIEF ENCOMPASSING CASE**

The Federal Railroad Administration ("FRA") and the Massachusetts Bay Commuter Railroad Company ("MBCR") (collectively the "Respondents") jointly submit the following Response to Hearing Petitioner's Brief Encompassing Case pursuant to Order No. 6 of Administrative Hearing Officer Rosenau's Order Setting Briefing Schedule, dated April 17, 2009, as follows:

I. Issues Presented

- (1) Whether Petitioner may now raise the new argument regarding whether MBCR had the authority to revoke Petitioner's certification pursuant to § 240.117(e)(1);
- (2) Whether the fact that a crewmember was not positioned on the leading end of the locomotive constitutes "an intervening cause" pursuant to 49 C.F.R. § 240.307(i)(1);
- (3) Whether the physical condition of the signal at issue constitutes "an intervening cause" pursuant to 49 C.F.R. § 240.307(i)(1); and

- (4) Whether the capability of the locomotive Petitioner operated during the incident to engage in reverse direction operation constitutes “an intervening cause” pursuant to 49 C.F.R. § 240.307(i)(1).

II. Standard of Review

Administrative hearings under 49 C.F.R. § 240.409 are conducted *de novo*, in order to “find the relevant facts and determine the correct application of [part 240] to those facts.” 49 C.F.R. § 240.409(c). Petitioner has the burden of proving that MBCR’s decision to revoke his certification was incorrect by a preponderance of the evidence. 49 C.F.R. § 240.409(q). Petitioner has not met this burden.

III. Factual Background

Respondents incorporate by reference the Joint Statement of Agreed-Upon Material Facts filed on March 20, 2009.¹

IV. Argument

Contrary to Petitioner’s arguments, MBCR properly revoked Petitioner’s certification. Petitioner first erroneously asserts that MBCR “lacked the authority to revoke Petitioner’s certification for allegedly violating 49 CFR Section 240.117(e)(1) . . .” Pet. Br. at 7. Petitioner then wrongly contends that three intervening causes prevented or materially impaired his ability to comply with the railroad operating rules or practices under § 240.117(e)(1). Pet. Br. at 8. As discussed below, the undisputed facts and the controlling law clearly establish that: the locomotive operated by Petitioner improperly passed the blue signal indication; Petitioner was not prevented, nor materially impaired, from complying with the applicable rules; and MBCR properly revoked Petitioner’s certification.

¹ For ease of reference, the Joint Statement of Agreed-Upon Material Facts is attached hereto as Exhibit C.

A. MBCR had the Authority to Revoke Petitioner's Certification Pursuant to § 240.117(e)(1)

MBCR was authorized to revoke Petitioner's certification pursuant to § 240.117(e)(1). Petitioner contends that "MBCR lacked the authority to revoke Petitioner's certification for allegedly violating 49 CFR Section 240.117(e)(1) as a matter of law, because the derail and associated blue flag on S&I Track No. 2 at Southampton Yard do not constitute 'a signal indication . . . that requires a complete stop before passing it' as that term is used in Section 240.117(e)(1)." Petitioner's argument is procedurally, legally, and factually incorrect.

As an initial matter, Petitioner has not properly raised this argument; indeed, this is the first time this argument has been voiced throughout the entire administrative hearing process. Petitioner did not raise this argument in the Request for Administrative Hearing, in the Initial Statement of Claims and Request for Relief, nor in the status conference of April 17, 2009, or elsewhere. More importantly, the parties had previously agreed at the April 17, 2009 status conference that there were only three legal issues, which were all "intervening cause" arguments under § 240.307(i)(1). This understanding was memorialized in Hearing Office Rosenau's most recent written Order, which expressly limited the legal arguments at issue, as follows: "The parties have agreed that there are three subsidiary legal issues concerning whether there was an 'intervening cause,' pursuant to 49 C.F.R. § 240.307(i)(1), which prevented the Hearing Petitioner's compliance with railroad operating rules and practices." Order No. 6 at 1. Petitioner's argument here falls outside of this limitation. As a result, Petitioner's argument is procedurally improper and should be discarded.

Regardless, even assuming that Petitioner's contention is procedurally appropriate, the argument is unsupported both legally and factually. Simply put, § 240.117(e)(1) authorized

MBCR to revoke Petitioner's certification. That provision provides, in relevant part, that when revoking an engineer's certification, "[a] railroad shall only consider violations of its operating rules and practices that involve: (1) Failure to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it" Here, it is undisputed that Petitioner operated the locomotive past the blue signal indication without stopping. See Ex. C at ¶¶ 6, 21, 24; see also Ex. B² at 167 (Petitioner's representative stating that "[i]t's obvious that yes, the locomotive engine 1131 did operate over a derail with a blue signal attached. We will stipulate to that, that's a known fact."); Ex. B at 152 (Petitioner responded "Yes" to the question of whether he "operated the 1131 past the blue flag and the derail on S&I 2 . . ."). Furthermore, it is undisputed that equipment must stop at a displayed blue signal indication. See Ex. C at ¶ 3. As such, MBCR had the authority to revoke Petitioner's certification pursuant to § 240.117(e)(1).

After a lengthy discussion of certain Part 240 rulemakings, Petitioner declares that, in this case, "the derail constituted a switch for purposes of applying Section 240.117(e)(1), and the blue flag associated with the derail served as a switch position indicator" and that, as a result, MBCR was not authorized to revoke Petitioner's certification. Pet. Br. at 13. Petitioner's argument is without merit. As noted above, § 240.117(e)(1) authorizes revocation where there is a failure to control a locomotive in accordance with a signal indication "excluding a hand or a radio signal indication or a switch." This language provides an exception for *switches*; however, it does not provide an exception for a derail that allegedly "constitutes a switch," or a blue flag that allegedly "served as a switch position indicator." Contrary to Petitioner's suggestion, there was a blue signal indication displayed in this case, separate and apart from a switch position

² For ease of reference, cited excerpts from the Transcript of the Revocation Hearing are included in Exhibit B, attached hereto.

indicator, which Petitioner's locomotive passed without stopping. Moreover, Petitioner's implication that MBCR somehow did not comply with certain regulations is without support. *See* Pet. Br. at 13. Consequently, MBCR was authorized to revoke Petitioner's certification pursuant to § 240.117(e)(1).

B. Petitioner was not Prevented or Materially Impaired by Any Intervening Cause from Complying with Applicable Operating Rules

Petitioner was not prevented or materially impaired from complying with the applicable rules, including NORAC Operating Rule 16. Petitioner contends that there are three different intervening causes under 49 C.F.R. § 240.307(i)(1). Petitioner's arguments lack merit.³ Petitioner's own actions and omissions caused the violation of NORAC Operating Rule 16 and the subsequent derailment.

1. The failure of Conductor Gesnaldo to position himself on the leading end of the locomotive did not prevent or materially impair Petitioner's ability to comply with applicable operating rules

Conductor Gesnaldo's failure to position himself on the leading end of Petitioner's locomotive does not constitute an intervening cause pursuant to 49 C.F.R. § 240.307(i)(1). Specifically, Conductor Gesnaldo's actions did not prevent nor materially impair Petitioner's ability to stop the locomotive at the blue signal indication as required by NORAC Operating Rule 16.

First, Petitioner could have stopped the locomotive in a timely manner if he had: used the locomotive's mirrors; turned around and looked out of the back window of the locomotive; or used the radio in accordance with applicable operating rules. *See* Ex. B at 62; *see also* Ex. B at

³ For ease of reference NORAC Operating Rules 16, 80, 705, 708, 711 and 956 are set forth in Exhibit A attached hereto. The parties stipulated these rules were applicable to train operations in Southampton Yard. *See* Ex. C at ¶ 3.

53-54. However, Petitioner did not do those things. Moreover, Conductor Gesnaldo's failure to position himself on the leading end of the locomotive did not relieve Petitioner of his responsibilities under NORAC Operating Rule 16. NORAC Operating Rule 16.a.3 prohibits, without exception, the movement of equipment beyond a blue signal, regardless of whether a conductor is properly positioned, or even present. *See* Ex. A at 2 ("Equipment must not pass a displayed Blue Signal"). Petitioner was not excused from complying with Rule 16 because of Conductor Gesnaldo's conduct. It must be noted that Petitioner, as the engineer, was in ultimate control of the locomotive in a safety-sensitive area of the Yard. Thus, Conductor Gesnaldo's failure to ride on the leading end of the locomotive did not prevent or materially impair Petitioner's independent responsibility to determine the status of the blue flag, the derail indicators, or to comply with NORAC Operating Rule 16.⁴

Furthermore, Petitioner's own failure to comply with NORAC Operating Rules 80, 705 and 956, contributed to his violation of NORAC Operating Rule 16. For example, NORAC Operating Rule 80, Restricted Speed, requires Petitioner to:

Control the movement to permit stopping within one-half the range of vision short of:

- a. Other trains or railroad equipment occupying or fouling the track,
- b. Obstructions,
- c. Switches not properly lined for movement,
- d. Derails set in the derailing position,
- e. Any signal requiring a stop.

⁴ Furthermore, the underlying facts suggest that Petitioner should have been aware that Conductor Gesnaldo was not, in fact, on the leading end of the locomotive. Specifically, Conductor Gesnaldo rode on the rear end of Petitioner's locomotive while Petitioner approached S&I Track #2. However, Conductor Gesnaldo then had to get off of the engine, cross over and then throw the switch, to allow Petitioner to back the locomotive onto that track. *See* Ex. C at ¶ 15-17. The record indicates that this switch was located on the Fireman's side of the locomotive (opposite from where Petitioner was seated). *See* Ex. C at ¶ 16. Conductor Gesnaldo had briefed both Petitioner and Engineer Clarke by radio as to how the moves were going to be accomplished. Ex. B at 130-131. The final move involved Mr. Clarke backing down S&I Track #3 and hitching onto the equipment from which the locomotive operated by Petitioner had been uncoupled. As such, Conductor Gesnaldo had to throw the switch again to direct the intended movement of the locomotive operated by Mr. Clarke. *See* Ex. C at ¶ 19. As such, Petitioner should have known that Conductor Gesnaldo was not on the leading end of his locomotive directing the movement.

See Ex. A at 4. Petitioner was required by Rule 80 to be in a position to stop the locomotive within one-half of his range of vision. Ex. B at 78-79. As such, Rule 80 also required Petitioner to observe the condition of the rails, regardless of Conductor Gesnaldo's location.

Petitioner also did not comply with the Rules applicable to Radio Transmissions in the Yard involving safety communications. See Ex. B at 151. Rule 705 provides that "[a]ny radio communication that is not fully understood or completed in accordance with the requirements of these rules shall not be acted upon" Ex. A at 7. And, Rule 711 provides, in pertinent part, as follows:

Employees must take the following actions when radio communication is used instead of hand signals to control a shoving, backing or pushing movement:

1. The employee directing the movement must specify a distance to be traveled. The distance specified must not exceed the distance known to be clear.
2. The movement must stop in one-half the specified distance, unless additional instructions are received.

Ex. A at 6. Here, Conductor Gesnaldo did not specify a definite distance for Petitioner to travel (telling Petitioner to go "in the clear"). See Ex. C at ¶18; Ex. B at 74. As such, Petitioner should not have moved the locomotive before contacting the Conductor and asking him for clarification of the communication to ensure safe movement. Ex. B at 74. Instead, Petitioner simply answered "Roger" in response to Conductor Gesnaldo's directions. See Ex. C at ¶18.

Lastly, Petitioner also failed to comply with Rule 956 of the NORAC Operating Rules, "Observing Signals; Moving Engine", which states that:

Engine Service Employees will be responsible for the observance of all signals and for controlling movements accordingly. To prevent injury to persons, to prevent damage to property and lading, and to avoid collisions and derailments they must:

1. Regulate the speed of their train
- And
2. Exercise discretion, care and vigilance in moving their train."

Ex. A at 8. Thus, even though Conductor Gesnaldo was not properly positioned to direct the movement, Petitioner was again not relieved of his responsibilities to operate the locomotive in observance of all signals, and to exercise discretion, care and vigilance.

For these reasons, Conductor Gesnaldo's failure to position himself on the leading end of Petitioner's locomotive does not constitute an intervening cause pursuant to 49 C.F.R. § 240.307(i)(1) because Petitioner still could have complied with the applicable operating rules. Moreover, the Blue Signal violation and subsequent derailment would not have occurred if Petitioner had complied with NORAC Operating Rules 80, 705, and 956.

2. The condition of the blue flag did not prevent or materially impair
Petitioner's ability to comply with applicable operating rules

Contrary to Petitioner's assertion, the condition of the blue flag did not prevent or materially impair Petitioner's ability to comply with the applicable operating rules, including NORAC Operating Rule 16. Petitioner argues that the condition of the signal constituted an intervening cause because he observed a yellow indication. However, substantial evidence indicates that a blue signal indication was displayed.

As discussed above, it is undisputed that Petitioner operated the locomotive past a blue signal indication. *See* Ex. C at ¶¶ 6, 21, 24; *see also* Ex. B at 167 (Petitioner's representative stating that "[i]t's obvious that yes, the locomotive engine 1131 did operate over a derail with a blue signal attached. We will stipulate to that, that's a known fact."); Ex. B at 152 (Petitioner responded "Yes" to the question of whether he "operated the 1131 past the blue flag and the derail on S&I 2 . . ."). Moreover, it is also undisputed that Petitioner operated the locomotive over a fixed blue flag signal -- i.e., the signal was not a temporary fixture, but part of the physical characteristics of the Southampton Yard. *See* Ex. C at ¶6. It is also undisputed that Petitioner

was familiar with the physical characteristics of the Yard; including the blue flag and derailment devices and with the operating rules applicable to operations in the Yard. *See Id.* at ¶¶ 1-7. As such, Petitioner knew that this particular blue flag consisted of a target, distinguishable during the day, which was next to a blue light, distinguishable at night.⁵ It is also undisputed that: September 27, 2006 was a warm, sunny day; that the derailment occurred in the middle of the afternoon (approximately 2:48 p.m.); and that Petitioner had an unobstructed view, along 235 feet of tangent track, of the blue flag from the switch. *See Id.* at ¶¶ 26, 29. In a subsequent investigation, it was verified that the derail and the blue target are visible from the point of the switch looking back approximately 250 feet towards the derail, and that while at some point the derail is lost to sight, the blue target (as opposed to the light) continues to be visible.⁶ *See Ex. B* at 63-64. It should also be noted that FRA had visited the S&I facility where the derailment took place and had taken no exception to the position of the derail or the configuration of the track leading up to it. *Id.* at 65.

Finally, even assuming, *arguendo*, that the light was “yellow” on September 27, 2006 as alleged by Petitioner, Petitioner was not prevented or materially impaired from complying with the blue flag rule. As discussed above, had Petitioner complied with the other operating rules applicable to operation in the Yard, namely those relevant to Radio Transmissions (Rules 705 and 711) and Movement at Restricted Speed (Rule 80), the violation of the Blue Flag indicator and the derailment would have been avoided. Strict compliance by Petitioner with any of these Rules would have alerted Petitioner that the blue flag target was engaged and the derail was “up”

⁵ Petitioner did not apparently make any observation of the condition of the blue flag target, which is placed for visibility during daylight hours, but is “certain” that the light, which is for visibility at night, was yellow.

⁶ It is also important to note that Petitioner ran through the blue flag in a congested yard area, at one of MBCR’s largest maintenance facilities, where hundreds of employees, contractors, and client employees are on and around the property every day. Indeed, Petitioner previously described the area as having “so much traffic” with “people all around.” *Tr.* at 143.

and would have prevented the derailment. As a result, the alleged condition of the light does not constitute an intervening cause.

3. The condition of the locomotive did not prevent or materially impair
Petitioner's ability to comply with applicable operating rules

Petitioner lastly claims that the condition of the locomotive constituted an intervening cause because, among other things, the locomotive's basic configuration and orientation were designed to facilitate forward movement, and the locomotive's side mirrors were dirty. Petitioner's claims have no merit.

As noted above, it is undisputed that Petitioner was an experienced locomotive engineer with knowledge of the physical characteristics of Southampton Yard, including the derail and blue flag indicator in question and the equipment used in operations. *See* Ex. C at ¶¶ 1-7. During the nine months preceding the derailment, Petitioner had spent 98 days working and, of those 98 days, he had been stationed in the Yard working on jobs requiring the movement of equipment around the Yard for 59 days (almost two months). *See Id.* at ¶¶ 1, 4-6. While the locomotive in question is designed primarily to facilitate forward operations, it is capable of, and used frequently for, backing maneuvers. Petitioner has offered no evidence that he was unfamiliar with the locomotive in question or with its safe operation – either in forward or backward maneuvers. The locomotive provided ample means for Petitioner to operate it safely, in compliance with the operating rules, and in a backward direction. Petitioner could have used the locomotive's mirrors (and he could have cleaned the mirrors if they were, in fact, dirty). He could have turned around and looked out the back window of the locomotive. Or, he could have used the radio. Petitioner could have used any of these methods to safely operate the locomotive, but did not. It is uncontested that all of these methods were available to Petitioner. Mr. Rae

testified that to operate the locomotive in the switching maneuver on September 27, 2006, Petitioner "could look in the mirror, he could also look back over his shoulder ... [or the move] could be done by radio." Ex. B at 62; *see also* Ex. B at 53-54.

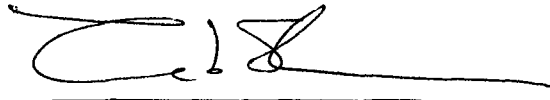
Moreover, Petitioner was operating a single locomotive, which offers more visibility than had he been attempting a backing operation while connected to passenger coaches, as in normal train operations. Furthermore, there is no evidence that there was anything extraordinary about the condition of the locomotive or the physical characteristics of the Yard on September 27, 2006. Petitioner had operated this type of locomotive, and had engaged in the same type of backing operation in the same vicinity of the Yard. Indeed, the only material difference here was that Petitioner failed to take the required precaution to operate the locomotive safely and in compliance with the applicable rules. As a result, Petitioner's actions and omissions, not the condition of the locomotive, prevented Petitioner from complying with the blue flag rule.

V. Objections to Relief Sought by Petitioner

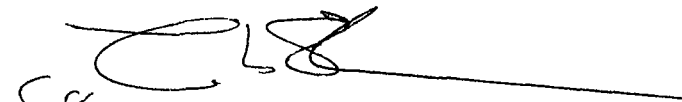
The Administrative Hearing Officer should decide that Petitioner's certification was properly revoked. In the event the Administrative Hearing Officer finds in favor of Petitioner, the relief requested should be limited to issuing a decision in accordance with 49 C.F.R. § 240.409(t) and (u).

Dated: July 2, 2009

Respectfully submitted,
ATTORNEYS FOR RESPONDENTS

A handwritten signature in black ink, appearing to be 'Zeb Schorr', written over a horizontal line.

Zeb Schorr
Federal Railroad Administration

A handwritten signature in black ink, appearing to be 'Larry R. Steffes', written over a horizontal line. To the left of the signature, the word 'for' is written vertically.

Larry R. Steffes
Massachusetts Bay Commuter Railroad
Company

RESPONDENTS'

EXHIBIT A

(Rule 13 Continued)

- (b) **Reduce Speed**
Held horizontally at arm's length



- (c) **Proceed**
Raised and lowered vertically.



- (d) **Back**

Swung vertically in a circle at half arm's length, at right angle to the track.



- (e) **Apply Air Brakes**
Swung horizontally above the head, when train is standing.



- (f) **Release Air Brakes**
Held at arm's length above the head, when train is standing.



- (g) **Drop or Raise Pantograph**
Swung vertically in a circle at full arm's length, at right angle to the track.



14. Unattended Fusees

If a train on a main track or controlled siding encounters an unattended fusee burning on a main track or controlled siding, or on a track next to a main track or controlled siding, it must stop. It must then proceed at Restricted Speed until the head end is 1 mile beyond the fusee.

A train must not be stopped over a burning fusee if it can be avoided. If so stopped and the train cannot be moved, the fusee must be extinguished.

Fusees must not be placed on bridges or other structures that are liable to be damaged by fire.

16. Blue Signal Protection of Workers

This rule prescribes the procedures for the protection of railroad workmen who work on, under or between equipment. "Workmen" refers to one or more employees assigned to inspect, test, repair, or service engines and/or cars. Train and Engine Service Employees are excluded except when assigned to perform work on equipment that is not part of movement they have been called to operate.

(Rule 16 Continued)

Restrictions

Once a Blue Signal has been displayed, the following restrictions apply:

1. The equipment must not be coupled to or moved.

EXCEPTION: When under the direction of the employee in charge of the workmen, engines may be repositioned within an Engine Servicing Track Area, and cars may be repositioned within a Car Shop Repair Track Area. Employees on the affected track must be informed of the movement, and Blue Signals must be removed from the equipment to be repositioned or coupled. The Blue Signals need not be removed from the switches or derails providing access to the track.

2. Other equipment must not be placed on the same track in a manner that will reduce or block the view of a Blue Signal.

Equipment must not pass a displayed Blue Signal.

4. Only a person of the same group or craft that displayed the signals may remove it, after all the workmen are clear.

b. Responsibilities of Workmen

Before going on, under, or between engines and/or cars, workmen must take the actions prescribed below. Each craft or group of workmen must display their own Blue Signals.

If the equipment is on a track other than a main track or controlled siding:

1. Attach a Blue Signal to the controlling engine(s) at a location where it will be clearly visible to an employee at the controls of that engine.
2. Line each hand-operated switch providing access to the track against movement to the track, and lock each switch with an effective locking device.

EXCEPTION: A derail locked in derailing position with an effective locking device may substitute for the hand-operated switch requirement. The derail must be positioned no less than 150 feet from the end of the equipment, except as follows. When equipment is in an Engine Servicing Track Area or a Car Shop Repair Track Area, where maximum authorized speed is not more than 5 MPH, the derail must be positioned no less than 50 feet from the end of the equipment.

3. Display a Blue Signal at each of the hand-operated switch and/or derail locations mentioned above.
4. Request and receive protection from the employee controlling any remotely controlled switches that provide access to the track. This procedure also applies to hump yard classification tracks where employees couple air hoses or adjust coupling devices.

If the equipment is on a main track or controlled siding:

1. Display a Blue Signal at each end of the equipment.
2. Attach a Blue Signal to the controlling engine(s) at a location where it will be clearly visible to an employee at the controls of that engine.

c. Responsibilities of Employee Controlling Remotely Controlled Switches

When requested to provide protection, the employee in charge of remotely controlled switches providing access to the track on which the equipment is located must line the switches against movement to the track and apply blocking devices. The employee must not remove the blocking devices until informed by the employee in charge of the workmen that the work has been completed. The employee controlling the switches must immediately make a written record on the prescribed form of the application and removal of the blocking device protection. This record must be retained for 15 days following the date of removal.

(Rule 16 Continued)

d. Blue Signal Unavailable

When emergency repair work is to be done on, under, or between engines and/or cars, and a Blue Signal is not available, the Engineer must be notified. The Engineer must take three actions:

1. Apply the brakes.
2. Place the reverser lever in neutral position or the controller in off position.
3. Open the generator field and/or control switch where equipped.

The engineer must maintain this protection until notified by the employee who requested it that the protection is no longer required.

e. Markers

Blue Signal protection must be provided for workmen when they are:

1. Replacing, repositioning or repairing markers, and the rear of the train is on any track.
2. Inspecting markers by repositioning the activation switch or covering photoelectric cell, and the rear of the train is on a track other than a main track or controlled siding.

f. Alternate Protection for Utility Employees

A Utility Employee is a train and engine service employee who is temporarily assigned to a train or yard crew to assist the crew in assembling, disassembling, or operating trains.

When the protection procedures and restrictions prescribed below have been complied with, Utility Employees may engage in the following activities without blue signal protection: setting or releasing brakes; coupling or uncoupling air hoses or other electrical or mechanical connections; preparing equipment for coupling; setting wheel blocks or wheel chains; performing air brake tests, including the cutting in or out of air brake components and the positioning of retaining valves; inspecting, testing, installing, removing or replacing markers or end of train devices. Under all other circumstances a Utility Employee working on, under or between equipment must have blue signal protection.

The following procedures and restrictions apply to the protection of Utility Employees:

1. A Utility Employee may perform service with only one train or yard crew at a time, and no more than 3 Utility Employees may be assigned to the same crew.
2. The train or yard crew must be assigned a controlling engine that is under the control of the assigned Engineer.
3. The Engineer must be in the cab of the controlling engine. If the engine is stationary, the Engineer may be replaced in the cab by another crew member.
4. Before beginning any duties with a crew, the Utility Employee must obtain permission from the crew's Conductor, or Engineer if no Conductor is assigned.
5. The Conductor, or Engineer if no Conductor is assigned, must notify each crew member of the presence and identity of the Utility Employee before authorizing the Utility Employee to work as part of the crew. Thereafter, communication must be maintained so that each crew member understands the duties to be performed and whether those duties will cause any crew member to go on, under, or between the equipment.
6. When the Utility Employee has finished working with the crew, the Utility Employee must notify the Conductor, or Engineer if no Conductor is present, who in turn must notify each crew member that the Utility Employee is no longer part of the crew. After each crew member has acknowledged the Utility Employee is no longer part of the crew, the Utility Employee must be notified that he is released from the crew.

MOVEMENT OF TRAINS

80. Movement at Restricted Speed

Movements made at Restricted Speed must apply the following three requirements as the method of operation:

1. Control the movement to permit stopping within one half the range of vision short of:

- a. Other trains or railroad equipment occupying or fouling the track,
- b. Obstructions,
- c. Switches not properly lined for movement,
- d. Derails set in the derailing position,
- e. Any signal requiring a stop.

AND

2. Look out for broken rail and misaligned track.

AND

3. Do not exceed 20 MPH outside interlocking limits and 15 MPH within interlocking limits. This restriction applies to the entire movement, unless otherwise specified in the rule or instruction that requires Restricted Speed.

90. Delay of Trains

Employees must not unnecessarily delay trains. Employees must promptly advise the Dispatcher of any known condition that will delay a train or prevent it from making Normal Speed.

When a train is delayed, the Conductor or Engineer (or other member of crew when instructed by the Conductor) must determine the cause as soon as the safety of their train will permit. As soon as practical, the Dispatcher or Operator must be informed.

91. Starting of Train

A train must not start until the Conductor has given or authorized:

1. The proper hand signal.

OR

2. The proper communicating signal.

OR

3. Permission by voice communication.

92. Departure Time

A train must not leave a station where it is scheduled to receive passengers in advance of its scheduled leaving time unless authorized by the Dispatcher or by the Timetable.

93. Movement within Yard Limits

Yard limits are designated by Timetable and indicated by yard limit signs.

Within yard limits, movements may be made on a main track by verbal permission of the Dispatcher (or Operator when authorized by the Dispatcher).

RADIOS AND TELEPHONES

Radio use must comply with regulations of the Federal Communications Commission (FCC). The following rules are set forth to meet these regulations and to provide a safe and efficient operation.

700. Use and Care of Radios

Company radios must be used exclusively for railroad operations. The use of radios other than those furnished by the Company for railroad operations is prohibited.

Employees using radio equipment must exercise care to prevent damage to or loss of the equipment. Employees assigned a portable radio will be responsible for the proper care and protection of it.

No technical adjustments may be made to a radio set, except by those employees specifically authorized.

701. Requirements for Trains

Each train must have a working radio on the leading end of the controlling engine when it is dispatched from its initial terminal. Each train must also be equipped with a working redundant means for communicating with the Dispatcher, Operator or Yardmaster. The redundant means shall be a radio on another engine in consist, a portable radio, cellular phone, or other means of wireless two-way communication.

702. Requirements for Track Cars and Roadway Workers

Track cars moving between work locations must have a working radio. When more than one track car is moving under the same authority, only one working radio is required.

Each employee assigned to provide on-track safety for Roadway Workers and each lone worker must have immediate access to a working radio. When immediate access to a working radio is not available, the employee must be within hearing range of a radio capable of monitoring transmissions from train movements in the vicinity. These requirements do not apply when the work location is physically inaccessible to trains, or has no through traffic or traffic on adjacent tracks during the period when Roadway Workers are present.

703. Communications Device Testing, Failure, Interference

Radio and other required communication devices must be tested as soon as practical to ensure that the equipment functions as intended, prior to commencement of the work assignment. The test of a radio shall consist of an exchange of voice transmissions with another radio.

The employee receiving the transmission shall advise the employee conducting the test of the clarity of the transmission. Radios and other required communication devices that do not operate properly must be removed from service and the Dispatcher or Yardmaster notified promptly. In event of radio failure en route, the Dispatcher must be notified as soon as practical.

Radio interference from another radio station must also be reported to the Dispatcher or Yardmaster promptly with information as to location, time, and, if possible, the identity of the interfering station.

If a radio fails on the controlling engine, the train may continue until the earlier of the next calendar day inspection or the next forward point where the radio can be repaired or replaced.

704. Radio Inspection

Employees shall permit inspection of the radio equipment in their charge and all FCC documents pertaining thereto by a duly accredited representative of the FCC at any reasonable time.

705. Radio Transmission and Reception Procedures

Before transmitting by radio, the employee must listen to ensure that the channel on which he intends to transmit is not in use.

All transmissions must be repeated by the employee receiving them except:

1. Transmissions used in yard switching operations.
2. Those transmissions that do not contain any information, instruction or advice that could affect the safety of a railroad operation.

Employees must ensure that radio contact with the proper persons has been made and must not take action until certain that all conversation with them has been heard, understood and acknowledged.

Any radio communication that is not fully understood or completed in accordance with the requirements of these rules shall not be acted upon and shall be treated as though not sent. Emergency communications are an exception.

An employee receiving a radio call must acknowledge the call immediately unless doing so would interfere with safety.

706. Radio Location and Monitoring

When their duties involve the use of radio, employees must have the radio on and tuned to the proper channel at all times. The volume must be adjusted so that all transmissions can be heard.

The Timetable designates fixed base stations, wayside stations, periods attended and assigned radio channels.

707. Emergency Communications

All employees shall give absolute priority to emergency communications. Except in answering or aiding a station in distress, employees shall refrain from sending any communication until certain that no interference will result to the station in distress.

708. Radio Messages: Content and Code Words

The following procedures will govern identification and content of messages when using radio:

When originating or initially responding to a radio call, employees must:

1. Identify their employing railroad.
2. Identify their base station, wayside station or yard station by name or other designation of station and location.
3. Identify their mobile radio unit by:
 - a. Schedule number if on a scheduled train.
 - b. Symbol and engine number if on an extra train. If engine belongs to another company, that company's initials must precede the engine number.
 - c. TC followed by the number of the car if on a track car.
 - d. Other appropriate mobile unit identification.

Communication must be as brief as possible and must use these key words:

"ROGER" to signify that the message was received and understood. When required by Rule 705, "ROGER" also means that you have repeated instructions correctly.

"OVER" at the close of each transmission to which a response is expected.

"OUT" at the close of each transmission to which a response is not necessary. "OUT" must be preceded by proper identification.

(Rule 708 Continued)

"EMERGENCY" transmitted three times to obtain use of radio channels for initial report of conditions endangering train movements.

709. Prohibited Transmissions

Employees shall not knowingly transmit:

1. Any false distress communication.
2. Any unnecessary, irrelevant, or unidentified communication.
3. Any obscene, indecent, or profane remark.

710. Radio Identification in the Yard

When positive identification is achieved in connection with switching, classification, and similar operations wholly within a yard, fixed and mobile units may use short identification after the initial transmission and acknowledgement. Short identification must include engine or unit number, such as "Back up 8271" or "Go ahead 8271."

If an exchange of communications continues without substantial interruption, positive identification must be repeated every 15 minutes.

711. Radio Communication Instead of Hand Signals

Employees must take the following actions when radio communication is used instead of hand signals to control a shoving, backing or pushing movement:

1. The employee directing the movement must specify a distance to be traveled. The distance specified must not exceed the distance known to be clear.
2. The movement must stop in one-half the specified distance, unless additional instructions are received.
3. The names of fixed signals affecting the movement must be communicated to the Engineer.

If the instructions are not understood or radio contact is not maintained, the movement must be stopped immediately. If the means of communication is changed, no movement may be made until all crew members have been notified.

712. Signal Indications

Dispatchers or Operators must not advise the aspect, name, or indication of any fixed signal, and crew members must not request this information. Crew members may use the radio to communicate a fixed signal to other members of the same crew.

Except as provided in Rule 241, radio communication may not be used to convey instructions that would have the effect of overriding the indication of a fixed signal. Radio communication may only be used to impose a more restrictive action than the indication of a fixed signal.

ENGINE SERVICE EMPLOYEES

950. Receiving Instructions; Governing Instructions

Engine Service Employees report to and receive instructions from the Superintendent or other designated officer. They will be governed by current mechanical, electrical, and air brake instructions pertaining to the safety, inspection, preparation and operation of trains and engines. Engineers must be qualified on the physical characteristics of the territory over which they are to operate.

951. Executing Instructions

Engine Service Employees must obey the instructions of Transportation Supervisors, Dispatchers, Operators, Yardmasters, and Station Masters within their jurisdiction. They must also obey the instructions of the Conductor in charge of their train as to the general management of the train. Exceptions to carrying out instructions may be made only if the instructions would endanger safety or commit a violation of the rules.

952. Qualification; Checking Inspection Forms

Engine Service Employees must be qualified on the type of engine to which they are assigned, including any devices or auxiliaries attached to it. At a point where no mechanical forces are on duty, they will check the prescribed form in the cab to be sure that the unit or units of the engine consist have been inspected within the previous calendar day.

953. Engine Unit(s) not within Date: Inspection

If the engine unit or units are not within date, Engine Service Employees will make an inspection. After making the inspection, they will:

1. Record the date, time and location on the prescribed form in the cab,
- AND
2. Prepare and sign the regular work report.

954. Inspection by Mechanical Forces

At points where mechanical forces have made an inspection of the condition of the engine, Engine Service Employees will accept this inspection. Engine air brake tests are an exception: Engine Service Employees must make these tests.

955. End-of-Trip Report

At the end of the trip, Engine Service Employees must make a written report on the prescribed form. When a defect occurs en route, the Dispatcher must be notified as soon as possible without delay to the train.

956. Observing Signals; Moving Engine

Engine Service Employees will be responsible for the observance of all signals and for controlling movements accordingly. To prevent injury to persons, to prevent damage to property and lading, and to avoid collisions and derailments they must:

1. Regulate the speed of their train,
- AND
2. Exercise discretion, care and vigilance in moving their train.

RESPONDENTS'

EXHIBIT B

Patriacca: Can you see what is immediately outside the window of the Engineer's work station?

Rae: It's a mirror.

Patriacca: A mirror. And if an Engineer were to look into the mirror, where would he gain or where would he be, or what area would he be able to observe?

Rae: The mirror covers quite a view of the rear of the locomotive and the tracks behind the locomotive.

Patriacca: If someone were on the ground directing this move, in your opinion, if the Conductor were on the ground directing this move from the rear of the train, he was standing, like I said, in the vicinity of the rear of the train next to it, he would be visible?

Rae: In my opinion, he would, yes. And the subsequent test that we did, it did show that the Locomotive Engineer would be visible in the mirror.

Patriacca: And do you know on S&I, Track Number 2, which side, if the engine were backing on to it in the direction it derailed or backing on to S&I, 2, where would the blue flag be located?

Rae: The blue flag indication is on the Engineer's side of the locomotive. The side where the Engineer sits, where he has a view.

Patriacca: Are you familiar with the track geometry and the tracks, in the section of track, hundred, two hundred feet leading up to the blue flag derail?

Rae: Yes.

Patriacca: Is there a bend or anything else that would obstruct the view of the derail from the mirror

Rae: Not during the, subsequent to the investigation, we did, we looked and it's tangent track, it's straight track and from the locomotive, the 1100 locomotive, using the mirror or even looking out through the back door, you would be able to see, have a clear view, all the way from the switch, all the way back, you would be able to see the blue flag. It's an unobstructed view, if that's what the question is.

Patriacca: Okay. So the engineer would have been backing into that position, whether the conductor was back there or not, would have an unobstructed view of the blue flag derail?

Rae: Yes he would, in my opinion.

Patriacca: Just getting back to the derail and the conditions of the derail, Mr. Newman touched on that. Your observations when you got there, were there any, could you give me the condition of the derail and any exceptions you took to the condition of the derail.

Rae: Well, the derail was in the off position. It had been moved by somebody subsequent to the derailment. The light inside the derail did not appear to be lit. It should have been. And the rods going from the derailing device into the electronics that control the switch stand that make the light go from either the on or the off position, the blue or the yellow position, the rods were bent and scarred from the locomotive wheels had passed over it multiple times and you could see that from the number of marks that were on the rods.

Rae: I wouldn't say that it's the only means would be looking in the mirror. No, I don't believe that to be correct.

Newman: So he would have to be looking in the mirror, would he not, to make a reverse move?

Rae: He could look in the mirror, he could also look back over his shoulder and he could also take instructions from an employee on the ground on the rear, there are many ways. It could be done by radio. There are times...

Newman: It can be done by radio if he had an employee on the ground or on the rear of the locomotive?

Rae: That is another way it could be done, yes.

Newman: All right. Thank you. I'd like to enter these pictures.

Herz: All right, the two pictures described through Mr. Newman's questioning of Mr. Rae, will be Employee Exhibit "#3." The first one is titled Engine 1121 Control Stand. The second one has two pictures showing the Engineer's seat. Again, collectively, two pictures, Employee Exhibit "#3." Anything further sir?

Newman: Not at this time.

Herz: Mr. Vierra, anything for Mr. Rae?

Vierra: No sir.

Herz: Mr. Patriacca, anything for Mr. Rae?

Patriacca: I have one question. The engineer, Mr. Newman said, if the engineer was sitting in the engineer's seat facing forward backing up, with the use of the mirror, how long, given the track geometry, how long would you have to look in the mirror to determine that the blue flag is displayed?

Rae: He had a view of the blue flag that was over two hundred feet long. May be closer to two hundred and fifty feet.

Newman: Objection.

Herz: What is your objection?

Newman: What is the basis of that estimate?

Rae: The basis...

Herz: You can question him.

Newman: All right.

Herz: Continue sir.

Patriacca: So, at any point prior to, so it was ample time to look in the mirror to determine the position of the derail?

Rae: There should have been, yes.

Patriacca: There should have been?

Rae: Yes.

Patriacca: Okay. No further questions.

Herz: Mr. Newman?

Newman: The derail, Mr. Rae, which rail is the derail on in this location? The derail itself?

Rae: The derail itself is located on what would be referred to as the North Rail.

Newman: That would be the fireman's side rail?

Rae: Yes, the opposite side from where the engineer sits.

Newman: Okay. So, it would not have been possible for Engineer Vierra to see the derail?

Rae: Well it is possible. We did a test and, from a locomotive and you are, from back at the switch all the way back at the switch, at some point you do lose sight of the derail.

Newman: From how far away again? What was your estimate?

Rae: When you're out at the switch, if you're in the vicinity of two hundred and fifty feet, you can see the derail and the blue target. And at some point as you back up, you begin to lose sight of the derail itself, but you still see the blue target attached to it.

Newman: Do you operate these engines quite often backwards, by yourself?

Rae: Not quite often by myself, no.

Newman: Okay. That's all I have for now.

Herz: Mr. Vierra?

Vierra: No questions.

Herz: Mr. Patriacca?

Patriacca: Just one. In the past three years, has the FRA visited the S&I Facility where the derailment took place?

Rae: Absolutely.

Patriacca: Have they taken exception to the position of the derail or the configuration of track leading up to it?

Rae: Not at that location. Not to the best of my knowledge. Not in any of the documentation I had seen.

Patriacca: No further questions.

Herz: Collectively, any further questions for Mr. Rae?

Patriacca: No.

Herz: Who will be your next witness sir?

Patriacca: Mr. DeModena.

Herz: All right. Mr. Rae, you will be excused, subject to recall. As long as we can get you on your cell, you will be fine. (Off Record)

Patriacca: No.

DeModena: Okay.

Patriacca: Based on the rules that we just reviewed, 705 and the other radio rules, what information should have been contained in the instructions if Mr. Vierra received from the Conductor?

DeModena: Well, as I said in the beginning in reading the transmission, let me open that again, I, with the number of years experience, was confused as to who was talking to whom and what they wanted done, mainly because there is no identification of anything, no proper co-words or key words used apparently with the exception of "Roger" and from the beginning of the transmission to the part where it looks like the Conductor is yelling, "Okay to stop." It appears as though the radio rules were ignored, compromising the safety of the move.

Patriacca: Based on the radio rules and... (Tape Ran Out)

Herz: This is side two, tape two, Investigation of Mr. Edmund Vierra. Sorry Mr. Patriacca, we cut you off. You are going to have to re-ask your question. Mr. DeModena just said the radio rules were ignored compromising the safety of the move.

Patriacca: Okay. Mr. DeModena, based on the radio rules we just reviewed 705, 708 and 711, what would an engineer prior to reversing direction backing blind to a blue flag derail, what information should be contained in the transmission?

Patriacca: Well, in accordance with the rules, first and foremost, the initial transmission has to be established using proper radio procedure and it should contain the employing railroad initially to identify the first transmission as well as the unit and symbol, in this case it would have been the Conductor calling the head end of the train. If that communication were heard, then his response, his initial response, the engineer's initial response should have also contained the employing company and to establish that communication.

After the initial communication was established, the, in this particular move, as I understand it, the Conductor would be required, if he wanted to reverse the move of that locomotive, to tell the engineer that he is to make a reverse move east and specify a distance to be traveled and he failed to any of the above. The engineer's responsibility, clearly, would have been to not accept the move, not turn the wheel, don't move the train until he had clarification off of radio transmission, especially working in engine service area, restricted speed.

Patriacca: So, given the content of the instructions that were issued to Mr. Vierra prior to backing up and the transmission from Gesinaldo, Conductor Gesinaldo to Vierra, the third transmission down, starting at 2:47:32, based on the content of that transmission, what should Mr. Vierra have done at that point?

DeModena: He should not have released the brake, he should not have engaged the throttle, he should not have moved that engine. He should have contacted the Conductor and asked him for clarification in accordance with the rules to ensure safe movement.

Patriacca: What did he do?

Herz: What is your objection?

Newman: We know what happened. We've been over this. The derailment happened.

Herz: All right.

DeModena: But from an engineer's point of view...

Newman: The derailment happened and I understand...

Herz: What point are you trying to make here?

Patriacca: I am trying to make the point that the radio rules were partially or were ignored to a great extent which increased the probability of something going wrong and if they were adhered to or if they had been recognized and the engine was operated in compliance with the radio rules, this never would have happened.

Herz: I think you asked him that direct question and he answered it about ten minutes ago Mr. Patriacca. So let's move on.

Patriacca: Okay. Mr. DeModena, you were here when the charges were read and you know what the charges include, in violation of NORAC Operating Rule 80. Was the operation of the engine 1131 on the date in question in compliance with NORAC Operating Rule 80?

DeModena: As I recall, I don't have it in front of me, I believe Operating Rule 80 is Restricted Speed?

Patriacca: Yes.

DeModena: And in accordance with the provisions of Restricted Speed, the response to that question is clearly no, the engine did not move in compliance with Rule 80, which I have in front of me now, thank you of the NORAC book, Rule 80, Movement at Restricted Speed. "Control the movement to permit stopping within one half the range of vision short of..." and skipping down to (d) Derails set in the derailing position as well as obstructions, switches not properly lined, other trains or railroad equipment fouling or occupying the track which, as I understand it, was on track 2 in the S&I his direct movement and any signal requiring a stop, which the most restrictive indication on the railroad, a blue flag signal does.

Patriacca: I'd like to enter that into evidence now.

Herz: This one-page document, NORAC Rule 80, Movement at Restricted Speed will be Exhibit "T, T." Continue.

Patriacca: Based on the evidence we have in front of us and as Mr. Newman said, we all know that the engine derailed that day, was NORAC Operating Rule 80 adhered to?

DeModena: No, it was not.

Patriacca: You were here when the charges were read and you know that one of the other Operating Rule, one of the other rules on the charge, NORAC Operating Rule 96, 956, excuse me. Are you familiar with that rule?

DeModena: I believe it's the Care and Vigilance rule for engineer responsibilities.

Herz: Speak up.

DeModena: I can move across the table.

Vierra: The thing is, you got like a Trainmaster and you've got the Mechanical Foreman. When you're on that side in the Station, you take them from the Trainmaster. When you're in the yard, you take them from the Mechanical Foreman.

Newman: Okay.

Vierra: Or the East End Coordinator.

Newman: Okay, so just bring up to how this, leading up to the incident, were you bringing the train up S&I 3, is that correct?

Vierra: Yes, it is.

Newman: You brought it from the station over?

Vierra: From the station. It had broken down. I brought it in.

Newman: Was there something wrong with that locomotive?

Vierra: Yes. They had some traction motors cut out and it was ready to go. They had to unload the people out there and they couldn't use it. Something was wrong with it. They said to bring it over. They had to swap out the engines. The engine was no good.

Newman: So we're talking about the Locomotive 1131?

Vierra: The 1131, yes.

Newman: So it was, it had problems at leaving time?

Vierra: Yes, it did.

Newman: Okay. So, what happened when you got over to the yard?

Vierra: I got over to the yard, I stopped on S&I 3 and Wally Marx who was the East End Coordinator told me to stop short of S&I 4 which is where the light engine was sitting, that they wanted to put on top of this set.

Newman: Is that the 1071?

Vierra: Yes, it was.

Newman: Okay. So you stopped in the clear of S&I 4 and then what?

Vierra: We let out the 1071 ahead of me. He crossed over from S&I 4 and went up to wherever he went.

Newman: Was that Engineer Clarke?

Vierra: Yes, it was, yes. And then once he got out of the clear, Mike threw the switch back and I pulled up to the cut point which is right at the fuel stand.

Newman: Were you still attached to the train?

Vierra: Yes, I was.

Newman: Okay. You pulled up to the cut point. And then what?

Vierra: Then we proceeded to, well, Mike gave all this stuff, told us what we were going to do. He gave a run down of what we were going to do.

Newman: Mike Gesna/do?

Vierra: Yeah, the Conductor.

Newman: And how did he do that? Verbally, face to face?

Vierra: Verbally, on the radio. It was all radio. Because I was up on the engine and he was down on the ground.

Newman: I'll show you the, Exhibit "J" which is the transcript. So what you just referred to was Conductor Gesnaldo's, is this the portion that you are referring to?

Vierra: Yes, exactly. Yes. Pulled down the train, spot at the fuel, that's how we usually do a cut. It's a normal cut.

Newman: Okay, so he's talking at this point to Engineer Clarke, is that correct?

Vierra: Yeah because he acknowledged him and then he said to me, "Eddie, follow Doug down."

Newman: Okay, so...

Vierra: And I acknowledged "Roger."

Newman: Okay, so the Mechanical Department cut the engine off and then...

Vierra: Actually, Mike cuts the engine off. All they do is take the wires out, the head end power cables. Mike does all the cutting, the hoses, well the hoses pull apart by themselves. All he does is cut the air, the brake pipe and the main reservoir. Mike cuts it and he pulls the lead to let the pin out to open up the knuckle so I can pull off.

Newman: And you thought you were heading for the building?

Vierra: Yes.

Newman: Why do you go slow there? I mean... It's good practice to go slow?

Vierra: There is so much traffic there. People working with us, you know, there's people all around. The Cut Crew is right over there doing a cut on the next track.

Newman: Okay.

Vierra: It's just a dangerous area to work. A lot of foot traffic, tow motors, a lot of things running around.

Newman: All right, well, what happened next as you went back?

Vierra: Mike told me to stop. I applied the brake and that's when I rolled over the derail.

Newman: What was your first thought when that happened?

Vierra: I said on the radio, "Mike, I thought you said the derail was down." And he said, "I'm sorry, I said on."

Newman: So were you pretty surprised to say to least?

Vierra: Probably the most surprised guy there out of everybody.

Newman: If you had any inkling again, I will ask one more time, forgive me, but if you had any inkling at all that the derail was in the derailing position, would you have operated the 1131 as you did?

Newman: Objection. That 's a confusing question.

Vierra: The thing is...

Herz: Do you understand the question sir?

Vierra: Yeah, but see, he did say "to the clear." To me, the clear was where I thought the clear was. And it's two different things, I understand. Right, but if he was, but that's why he's back there to take care of this and stop the train or tell me to stop in case I'm too close to something or watching me what I can, he can keep an eye on me to do this. I'm under his control.

Patriacca: If you had been given a specific distance, and radio communication or whatever the case may be, specific distance would have prevented this? Do you agree with that?

Vierra: If he gave a specific... Like a car... Are you saying...

Patriacca: A long car, a half a car?

Vierra: Yes, yes. But you've got to understand, everybody, nobody followed radio rules here in this whole yard. You would have to take this whole yard out of service. I didn't do anything different than any other engineer did.

Patriacca: I understand that.

Vierra: Okay.

Patriacca: And this situation is on the table at this point. This investigation concerns you and Mr. Gesnaldo.

Vierra: I understand.

Patriacca: And I'll leave it at that.

Vierra: Okay.

Patriacca: Can I transfer to my questions or where it is his witness and then I...

Herz: You are asking questions now. You have been asking questions.

Patriacca: Yes, well I was cross-examining, based on Mr. Gesnaldo's, based on Mr. Newman's questioning.

Herz: No, it is your turn.

Patriacca: Okay. All right.

Herz: The first time is the hardest.

Patriacca: We've already established that you were the engineer on the light engine when it backed up on the S&I Number 2 track on the 27th at a derail.

Vierra: Yes.

Patriacca: Okay. And in doing so, you operated the 1131 past the blue flag and the derail on S&I 2, on the west end of the S&I Building.

Vierra: Yes.

Patriacca: Did you immediately notify the dispatcher or your supervisor after the incident?

Herz: All right. I will put it in and you can keep your copy. Go ahead.

Newman: Okay. And I'd also like to introduce this letter which is a letter from me to the MBTA regarding the 1100 locomotives. It bears on the brake, the type of independent brake and the switching platform. In reference to the regional switching operations. It's relevant to this only because an 1100 engine was involved in this.

Herz: All right. That will be Employee Exhibit "#9."

Newman: Thank you. With respect to the incident today, Engineer Vierra was charged with violation of four rules as one charge. I disagree that the Carrier and the MBCR Road Foreman staff... I don't believe they have proven their charges against Engineer Vierra. To the contrary, the testimony of the experts, expert witnesses produced by MBCR fails to take into account the actual facts that were prevailing on September 27th. What I mean by that is the actual understanding of Engineer Vierra as he operated Locomotive 1131 and as he took his instructions from Conductor Gesnaldo on that date. We need to look at the rules that he was charged with. We need to keep in mind, his state of mind on that day as he operated the engine.

Rule 16 is the blue signal rule. It's obvious that yes, the locomotive engine 1131 did operate over a derail with a blue signal attached. We will stipulate to that, that's a known fact.

Rule 80, the Operating Rules, the Restricted Speed Rule, we believe that the Organization has proven that the responsibility to comply with Restricted Speed is a shared responsibility between the Conductor and the Engineer according to Special Instruction 116-S1 which clearly applies to this movement... this back up movement of a train.

RESPONDENTS' EXHIBIT C

**U.S. Department of Transportation
Federal Railroad Administration
Washington, D.C.**

**FRA Locomotive Engineer Certification Case
DOT Docket No. FRA 2007-0009
FRA Docket No. EQAL 2007-11**

**Edmund Vierra, Petitioner
Massachusetts Bay Commuter Railroad Company (MBCR), Co-Respondent**

Joint Statement of Agreed-Upon Material Facts

Richard K. Radek, Representative for the Petitioner, Larry R. Steffes, Counsel for Respondent MBCR, and Zeb Schorr, Counsel for Co-Respondent FRA, submit the following "Joint Statement of Agreed-Upon Material Facts" in connection with the above-captioned Engineer Certification Case.

1. As of September 27, 2006, Petitioner had 12 years of experience as an engineer first with Amtrak and then MBCR when MBCR took over the MBTA operations.
2. Like all other MBCR engineers and conductors, as of September 27, 2006, Petitioner was NORAC Qualified, and knowledgeable concerning NORAC Operating rules applicable to train operations in the Southampton Yard.
3. NORAC rules applicable to train operations in Southampton Yard include the following rules:
 - NORAC Operating Rule 16 (Blue Signal Protection)
 - NORAC Operating Rule 80 (Movement at Restricted Speed)
 - NORAC Operating Rule 956 (Observing Signals)
 - NORAC Operating Rules 705, 708, and 711 (Radio Transmission and Reception Procedures)

MBCR Special Instruction 116-SI (MBCR Timetable, p. 116) is also relevant to train operations in Southampton Yard.

4. On September 27, 2006, Petitioner was also qualified and knowledgeable concerning the Physical Characteristics in the Southampton Street Yard.
5. From January 1, 2006 until September 27, 2006, Petitioner had worked 98 days in or out of Southampton Street Yard, and during 59 of those 98 days, he was stationed in the Yard working on a House job which moves equipment around in the Yard.
6. The derail device and blue flag on S&I No. 2 in Southampton Yard are fixed devices and part of the Physical Characteristics of the Yard.
7. The purpose of the fixed derail device and blue flag on S&I No. 2 is to protect employees working inside the Service and Inspection (S&I) Building on equipment. There was equipment in the S&I Building on September 27, 2006 from 2:20 pm until 3:50 pm.
8. On September 27, 2006, Petitioner was working as an extra house engineer on assignment ES-WAD-1 in the Southampton Street Yard in Boston, Massachusetts. Petitioner's duties included moving trains between South Station and the Service and Inspection (S&I) Building located within Southampton Street Yard.
9. Petitioner was working assignment ES-WAD-1 alone, i.e., without an assigned train or yard service co-worker or crew member.
10. At approximately 2:30 p.m. during his tour of duty on September 27, 2006, Petitioner was engaged in moving Engine No. MBTA 1131 in the vicinity of west end of the S&I Building in the Southampton Street Yard.
11. Engine 1131 is an EMD-built, and GEC Alsthom re-built GP-40MC locomotive designed for high speed passenger train service. It is approximately 65' long, with approximately 50' of its length ("long hood end") behind the operating cab, and 15' of its length ("short hood end") in front of the operating cab.
12. Engine 1131's design with respect to the placement of desk-top controls, gauges, windshield glass, engineer's seat and other operating appurtenances is to facilitate movement in the forward (short hood forward) direction.
13. An engineer's visibility to the rear of Engine 1131 is obstructed by the long hood portion of the locomotive. Rear view mirrors are mounted outside

the side windows on both the engineer's and fireman's sides of the locomotive to enable vision to the rear of the engine.

14. At approximately 2:40 p.m. during Petitioner's tour of duty on September 27, 2006, he was instructed by "Wash Crew" Conductor M. Gesnaldo to assist in an "engine swap" switching move. The move entailed, for Petitioner's part, cutting (uncoupling) Engine 1131 from its coaches on S&I Track No. 3 and placing Engine 1131 on S&I Track No. 2.
15. Conductor Gesnaldo uncoupled Engine 1131, and Petitioner operated it in a forward direction from Track No. 3 onto the lead (trunk track). When the rear end of the engine cleared the switch from S&I Track No. 3, conductor Gesnaldo signaled Petitioner to stop.
16. Gesnaldo then crossed to the opposite side at the long hood end (rear) of the locomotive, taking himself out of Petitioner's field of view, in order to line the No. 3 track switch for the lead, the switch stand being on the opposite (fireman's) side of the engine from the engineer's control desk.
17. After lining the switch, Gesnaldo mounted the rear end of the engine on the fireman's side, and rode it to the No. 2 track switch. He radioed Petitioner to stop, then lined the switch for movement to Track No. 2.
18. Gesnaldo radioed Petitioner to back into the clear. He said "the derail's on." Petitioner did not repeat Gesnaldo's directions but simply acknowledged Gesnaldo's transmission by responding "Roger."
19. When Petitioner began backing into S&I Track No. 2, Gesnaldo remained at the switch so as to reline the switch for another locomotive to proceed to the coach cars from which Engine 1131 had been uncoupled. After relining the switch for the other locomotive, Gesnaldo rode it back to the uncoupled coach cars.
20. As Petitioner backed Engine 1131 through the switch onto S&I Track No. 2, Gesnaldo would have been visible to the front of the Engine 1131, the direction the opposite of which Engine 1131 was proceeding. However, Petitioner did not see Gesnaldo because he was looking in the mirror. Petitioner claims he did not know that Gesnaldo did not again mount the engine to ride it into the clear.
21. Seeing Engine 1131 draw near the derail, Gesnaldo radioed Petitioner to stop. However, the movement did not stop before one set of wheels passed over the derail, derailing one axle.

22. Petitioner testified at the November 9, 2006 hearing into the matter that he had understood Gesnaldo to say the derail was "down."
23. By rule, Gesnaldo should have ridden Engine 1131 into Track No. 2 on the leading (rear) end of the engine, directing Petitioner's movement.
24. The blue flag/blue signal on S&I Track No. 2 was located on the engineer's side of the engine. The derail device on Track No. 2 was located on the fireman's side of the engine. As Petitioner approached it during the backing move, he eventually lost sight of it.
25. The derail device and the blue flag/signal on S&I Track No. 2 were located approximately 235 feet from the points of the switch on the lead to Track No. 2.
26. The track segment from the switch to the blue flag signal and derail is tangent. There was an unobstructed view from the switch to the derail and the blue flag.
27. Petitioner testified that as he backed up on Track No. 2, the derail signal looked yellow, which, if in fact was the case, would have indicated that the derail was in the down or off position.
28. In backing from the switch, Vierra operated the engine from his seat facing forward (opposite the direction of travel) looking almost the entire way through the mirror located outside his window.
29. The weather conditions on September 27, 2006 were warm, sunny, and a clear day.
30. As a result of Petitioner's operation of Engine 1131 past the derail device on September 27, 2006, Engine 1131 and rail infrastructure was damaged at a cost of approximately \$20,000 to repair.
31. The parties agree to append to the record, by a date no later than the First Scheduling Conference, photographs that are accurate images of the derail device, the blue flag/blue signal, and S&I No. 2 Track from the switch to the derail device.
32. The parties also agree to include in the record of this Administrative Proceeding the corrected transcript and attached exhibits of the November 9, 2006 hearing, and stipulate that the transcript and exhibits present an accurate record of the proceedings at that hearing.

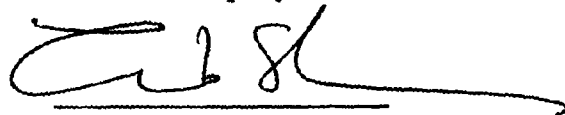
Dated: March 20, 2009

Respectfully submitted,
ATTORNEYS FOR PARTIES

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For Hearing Petitioner



Larry R. Steffes
Massachusetts Bay Commuter
Railroad Company



Zeb Schorr
Federal Railroad Administration

Dated: March 20, 2009

**Respectfully submitted,
ATTORNEYS FOR PARTIES**

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**Richard K. Radek
For Hearing Petitioner**

**Larry R. Steffes
Massachusetts Bay Commuter
Railroad Company**

**Zeb Schorr
Federal Railroad Administration**

CERTIFICATE OF SERVICE

DOT DKT. No. FRA 2007-0009

The undersigned hereby certifies that the foregoing document has been served to all parties named below via U.S. mail unless otherwise noted.

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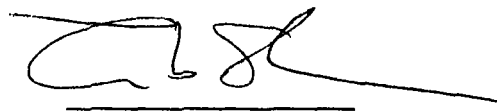
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